

TAB 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 13 2004

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

SCIMED LIFE SYSTEMS, INC.,

Plaintiff,

v.

MEDTRONIC VASCULAR, INC.,

Defendant and Counterclaimant,

and ERIC C. MARTIN,

Defendant and Counterclaim-Defendant.

CASE NO. 1:01CV2015 (RJL)

PROTECTIVE ORDER

WHEREAS, Medtronic Vascular, Inc. ("Medtronic") and Scimed Life Systems, Inc. ("Scimed") each may seek discovery or documents, information or other materials which may contain or relate to, *inter alia*, valuable research, development, commercial, financial and technical proprietary data, or other information that another party or a nonparty regards as confidential, proprietary or trade secret information of another party or of a nonparty in the above-captioned action (the "Action");

IT IS HEREBY ORDERED that the following Protective Order be entered in this Action:

1. This Protective Order shall cover all information, documents, or tangible items disclosed and/or produced in connection with any discovery taken in the above-captioned action pursuant to the Federal Rules of Civil Procedure and Local Rules of Civil Practice and Procedure of the United States District Court for the District of Columbia or disclosed and/or produced in connection with any hearings or other proceedings in the above-captioned action. All

(14)

information, documents, or tangible items covered by this Protective Order shall be used only for the purposes of this litigation and shall not be used for any purpose outside of this litigation.

2. The following classification shall apply:

a. "Confidential Information" shall mean and include any document (whether in hard copy or electronic or computer readable form), thing, deposition testimony, interrogatory answers, responses to requests for admissions and/or production, or other information provided in discovery in this Action ("Discovery Material"), which contains non-public, confidential or proprietary information, whether personal or business-related, including but not limited to information that constitutes, reflects, or concerns trade secrets, know-how or proprietary data, business, financial or commercial information, the disclosure of which is likely to cause harm to the competitive position of the party making the confidential designations on Discovery Material ("the Designating Party").

b. All such Confidential designations shall be made in good faith by the Designating Party and made at the time of disclosure, production, or tender to the party receiving the same ("Receiving Party"), or at such other time as permitted by this Protective Order, provided that the inadvertent failure to so designate does not constitute a waiver of such claim, and a party may so designate Discovery Material after such Discovery Material has been produced, with the effect that such Discovery Material is thereafter subject to the protections of this Protective Order in accordance with such designation.

c. When the Designating Party produces files, records or materials for inspection, no marking need be made in advance of the inspection. All files, records, and materials subject to inspection shall be treated as "Confidential." Upon selection of files,

records, or materials for copying, the witness or producing party shall mark the copies with the appropriate classification prior to production to the inspecting party.

d. A Confidential Designation shall constitute a representation that such Discovery Material has been reviewed by an attorney for the Designating Party and that there is a valid basis for such designation.

3. The designation of Discovery Material as Confidential in the form of documents, responses to requests for admission and interrogatories, or other tangible materials (including, without limitation, CD-ROMs and tapes) other than depositions or other pretrial testimony shall be made by the Designating Party in the following manner:

a. Documents designated "Confidential" shall be so marked by conspicuously affixing the legend "CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER" on each page containing any Confidential Information (or in the case of computer medium on the medium and its label and/or cover) to which the designation applies. Such designated Discovery Material shall be identified by Bates number. To the extent practical, the Confidential legend shall be placed near the Bates number;

4. Confidential Information shall not include any Discovery Materials which:

a. Have been or become lawfully in the possession of the Receiving Party through communications other than production or disclosure in this Action, or in other litigation, for example, as a result of legitimate business dealings between the parties, unless those documents are covered by a separate non-disclosure or confidentiality agreement, in which case the Receiving Party may continue to use such documents in the course of its business subject to those agreements; or

b. Have been or become part of the public domain by publication or otherwise and not due to any unauthorized act or omission on the part of the Receiving Party or any of its authorized representatives or designees under this Protective Order. Nothing herein shall impose any restriction on the use or disclosure by a party or nonparty of its own documents or information.

5. Subject to paragraph 6 of this Protective Order, "Qualified Persons" having access to Discovery Material designated "Confidential Information" under this Protective Order, in this Action are:

a. McDermott, Will & Emery LLP, attorneys of record for Medtronic, their stenographic, clerical and paralegal employees whose duties and responsibilities require access to such materials;

b. Jones Day, attorneys of record for Scimed, their stenographic, clerical and paralegal employees whose duties and responsibilities require access to such materials;

c. For each party, a total of three (3) in-house counsel or patent agents (collectively "in-house counsel") whose names are listed below and who have responsibility for maintaining, defending or evaluating this litigation. The approved in-house counsel are as follows:

	Medtronic, Inc.	Scimed Life Systems, Inc.
Name Title	Sue R. Halverson Vice President, Assistant General Counsel, Litigation	Luke R. Dohmen Vice President and Chief Patent Counsel, Scimed Life Systems, Inc.
Name Title	Michael J. Jaro Chief Patent Counsel	Peter J. Gafner Director and Managing Counsel for Cardiology Litigation, Scimed Life Systems, Inc.

	Medtronic, Inc.	Scimed Life Systems, Inc.
Name Title		Steven A. McAuley Patent Counsel, Scimed Life Systems, Inc.

The parties may identify additional in-house counsel who meet[s] the above criteria for inclusion on this list following execution of this Protective Order by providing written notice of the names of the additional in-house counsel to the other parties pursuant to Paragraph 7. The parties to this Action may substitute in-house counsel who meet the above criteria for good cause shown;

d. Retained independent consultants or experts, for purposes of this Action only (as well as their staff, stenographic, and clerical employees whose duties and responsibilities require access to such materials) who are not current employees of any party to this litigation, or any direct competitor of any party to this litigation;

e. The Court, Court personnel, and stenographic and video reporters engaged in proceedings incident to this Action;

f. Outside document copying services, document coding or computerization services, trial graphics consultants, jury and trial consultants, and other entities retained by counsel of record to aid in the preparation of or in the trial of this action. The class of persons identified in this subsection does not include any independent consultants or experts as set forth in subsection (d) above. Notwithstanding any other provision of this Protective Order, access to Confidential documents shall be permitted to the entities listed in this subsection (f), without need for the completion of Exhibit A or the execution of Exhibit B. The outside counsel providing Confidential documents to an entity listed in this subsection shall be responsible for that entity's compliance with the provisions of this Protective Order.

6. Qualified Persons defined in paragraph 5(d) shall be allowed access to Confidential Information only after complying with the following procedure:

a. A Receiving Party who desires to give access to Discovery Materials designated by another party or witness as Confidential Information to a person described in paragraph 5(d) shall first provide written notice to the Designating Party of the proposed person to receive such materials. The written notice shall include a written list, in a form similar to Exhibit A hereto, setting forth the name of the person, his or her occupation, and business address, a curriculum vitae and disclosure of any past or current relationship with any party in this Action. The Designating Party shall have seven (7) business days after receipt of the written notice to object in writing to the disclosure of Confidential Information to the proposed expert or consultant. If the parties are unable to resolve that objection, the objecting party shall, no later than five (5) business days after objection, move the Court for an order prohibiting the disclosure at issue. The objecting party shall have the burden of persuasion that disclosure should not be made. A failure by the Designating Party to timely serve an objection or file a motion shall be deemed to constitute approval of disclosure to the proposed person. If a written objection and a timely motion to prohibit disclosure has been made, no Confidential Information shall be made available to the proposed expert or consultant unless and until the Court rules that disclosure can be made. This objection procedure does not apply to the approved individuals already listed in paragraph 5(c);

b. Before receiving any Confidential Information, the person shall be furnished with a copy of this Protective Order and shall acknowledge, by executing the acknowledgment form attached hereto as Exhibit B, that he or she has read this Protective Order, understands it, and agrees to be bound by it, and also expressly consents to the jurisdiction of this

Court in connection with any proceeding or hearing relating to the enforcement of this Protective Order. In-house attorneys authorized to receive Confidential Information shall not be required to execute the acknowledgment form, but shall otherwise be bound by its terms;

c. Outside counsel for each Receiving Party shall retain a copy of each such written list (Exhibit A) and acknowledgment form (Exhibit B), and shall serve opposing counsel with a copy of these documents upon request and thereafter upon revision of such documents.

7. Confidential Information and the substance or content thereof, including any notes, memoranda or other similar documents relating thereto, shall be used by a Receiving Party and its authorized representative or designees under this Protective Order solely for the purpose of this Action and any appeals therefrom, and shall not be made available, or disclosed, or summarized to any persons, including the parties, other than as permitted by paragraphs 5-6 of this Protective Order. Confidential Information shall be maintained by the Receiving Party under the overall supervision of outside counsel.

8. Any person in possession of Confidential Information shall exercise care with regard to the storage, custody or use of such Confidential Information in order to ensure that the Confidential nature of the same is maintained.

9. If Confidential Information is disclosed to anyone other than in a manner authorized by this Protective Order, the party responsible for such disclosure must: (a) immediately bring all pertinent facts relating to such disclosure (including to whom the disclosure was made and the specific documents or information disclosed) to the attention of the Designating Party of the Confidential Information; (b) retrieve such information, or, where the information is not retrievable, certify that it has been lost or destroyed and that no copies are within the possession, custody or control of unauthorized recipients of the information,

documents, or materials; and (c) request that the person to whom the information was disclosed sign an acknowledgement in the form of Exhibit B; and (d) prevent further disclosure.

10. When Confidential Information is discussed, quoted or referred to in any deposition, the disclosing party shall ensure that only persons permitted by paragraph 5 of this Protective Order to have access to such Information are present. During any hearing or trial persons not authorized to have access to confidential information shall be asked to leave the courtroom when such Confidential Information is being published. The confidentiality of evidence not published in open court during any hearing or trial is not waived.

11. During the course of preparing for a deposition or testimony, a fact deponent/witness may be shown Confidential Information from another party's documents strictly limited to those documents which on their face reveal that they were authored or received in the normal course of business by the deponent/witness. Use of Confidential Information during a deposition shall be subject to compliance with this Order.

12. Any deposition transcript containing Confidential Information shall be marked on the cover as "Confidential Pursuant To Protective Order," and shall indicate as appropriate within the transcript what information has been so designated. Whenever possible, the stenographic reporter shall be requested prior to the deposition (where the attorneys have reason to believe the testimony will contain Confidential Information) or when the Confidential Information is disclosed (when not previously anticipated) to separate those portions of the transcript containing Confidential Information and separately bind it from the non-confidential portions. However, a party may designate any portion or all (if appropriate) of the transcript as containing Confidential Information by so advising, with reasonable precision as to the affected testimony, the deposition reporter, who shall accordingly indicate in the deposition transcript

what portion(s) of the testimony (or exhibits thereto) were so designated, or by so advising all other parties in writing, and with page and line designations, within ten (10) business days after receipt of the transcript. Until ten (10) business days have passed after the receipt of any transcript, that entire transcript shall be deemed to be Confidential. In the event of disagreement about the confidential status of a deposition transcript, it shall continue to be treated as Confidential until the Court rules otherwise.

13. Any Designating Party may redact from the documents and things it produces (1) sensitive matter not relevant to the subject matter of this litigation, and (2) matter that the Designating Party claims is subject to attorney-client privilege, work product immunity, a legal prohibition against disclosure, private patient medical data, or other privilege or immunity. The Designating Party shall mark each document or thing where matter has been redacted with a legend stating "REDACTED FOR RELEVANCE" or "REDACTED FOR PRIVILEGE" as appropriate, or a comparable notice. Where a document consists of more than one page, at least the first page and each page on which information has been redacted shall be so marked. The Designating Party shall preserve an unredacted version of each such document. This provision shall not affect any obligation to provide a log of information redacted or otherwise withheld on the basis of attorney-client privilege, work product immunity, a legal prohibition against disclosure, or other privilege or immunity.

14. Any pleading, paper or other document filed in this action which contains or discloses Confidential Information shall be filed under seal and shall be maintained under seal according to the terms of this Protective Order or as otherwise determined by the Court. When filing pleadings, motions, briefs, discovery materials, and other papers, which contain Confidential Information, the party so filing shall designate the following on the first page of

filed documents: "Filed Under Seal - Subject To Protective Order - Contains Confidential Material - May Only Be Opened by Order of the Court" and shall otherwise comply with the Court's order on the subject.

15. Entering into, agreeing to and/or producing or receiving Confidential Information or otherwise complying with the terms of this Protective Order shall not:

a. Operate as an admission by any party that any Discovery Material designated as Confidential Information contains or reflects trade secrets or any other type of confidential or proprietary information entitled to protection under applicable law;

b. Prejudice in any way the rights of any party to object to the production of documents it considers not subject to discovery, or operate as an admission by any party that the restrictions and procedures set forth herein constitute adequate protection for any particular information deemed by any party to be Confidential Information;

c. Prejudice in any way the rights of any party to object to the authenticity or admissibility into evidence of any document, testimony or the evidence subject to this Protective Order;

d. Prejudice in any way the rights of any party to seek a determination by the Court whether any Discovery Material or Confidential Information should be subject to the terms of this Protective Order;

e. Prejudice in any way the rights of any party to petition the Court for a further protective order, or modification or amendment of this order, relating to any purportedly Confidential Information;

f. Prejudice in any way the rights of any party to petition the Court for permission to disclose or use particular Confidential Information more broadly than would otherwise be permitted by the terms of this Protective Order; or

g. Prevent any Designating Party from agreeing to alter or waive the provisions or protections provided for herein with respect to any particular Discovery Material designated as Confidential Information by that party.

16. If a party disagrees with any designation of Confidential Information, such party shall first make its objection known to the producing party and request a change of designation. The parties shall first try to resolve such dispute in good faith on an informal basis. If the dispute cannot be resolved, the party challenging the designation may request appropriate relief from the Court no sooner than five (5) days following the service of a written notice of disagreement. The burden of proving that information has been properly designated as Confidential is on the party making such designation. Until a determination by the Court, the information in issue shall be treated as originally designated by the producing party. Any failure to object to any material being designated as Confidential shall not be construed as an admission by any non-designating party that the material constitutes or contains a trade secret or other confidential information.

17. All provisions of this Protective Order restricting the use of information obtained during discovery shall continue to be binding on the parties and all persons who have received information under this Protective Order, after the conclusion of this action, including all appeals, until further Order of the Court, unless the parties agree otherwise in writing. Upon conclusion of this matter, outside experts and consultants shall return or destroy all Confidential Information in their possession, including notes or other documents prepared relating to such information. Any and all originals and copies of Discovery Materials designated Confidential (including all

originals or copies in the possession of any outside experts or consultants, and any notes or other documents prepared by such persons relating to any Confidential Materials) shall, at the request of the producing party, be returned to the party within sixty (60) days after a final judgment herein or settlement of this Action, or, at the option of the producing party, destroyed in that time frame, except that outside counsel for each party may maintain in its files one copy of each pleading filed with the Court, each deposition transcript together with the exhibits marked at the deposition, and documents constituting work product which were internally generated based upon or which include Confidential Information. In the event that outside counsel maintains such documents, it shall not disclose material containing any type of Confidential Information to another party absent subpoena or court order. In the event that documents are returned to or destroyed at the request of the producing party, the other party or its outside counsel shall certify in writing that all such documents have been returned or destroyed, as the case may be.

18. By entering this Protective Order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this Protective Order who becomes subject to a motion to disclose another party's information designated Confidential Information pursuant to this Protective Order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed. If any Receiving Party is subpoenaed in another action, served with a demand in another action to which it is a party, or served with any other legal process by one not a party to this action seeking information which was produced or designated as Confidential by someone other than the receiving party, the receiving party shall transmit a copy of such subpoena, demand, or legal process, by hand or facsimile transmission, within three

business days of receipt of such subpoena, demand, or legal process, to the producing party and prepare timely objections to production of the Confidential Information. Should the person seeking access to the Confidential Information take action against the receiving party or anyone else covered by this Protective Order to enforce such a subpoena, demand, or other legal process, the receiving party shall respond by setting forth the existence of this Protective Order. Nothing herein shall be construed as requiring the receiving party or anyone else covered by this Protective Order to challenge or appeal any order requiring production of information covered by this Protective Order, subject itself to any penalties for noncompliance with any legal process or order, or seek any relief from this Court.

19. The inadvertent production in discovery of any privileged or otherwise protected or exempted information, as well as the inadvertent production in discovery of information without an appropriate designation of confidentiality, shall not be deemed a waiver or impairment of any claim or privilege or protection including but not limited to the attorney-client privilege, the protection afforded to work-product materials or the subject matter thereof, or the confidential nature of any such information, provided that the producing party shall immediately notify the Receiving Party in writing when inadvertent production is discovered. Upon receiving written notice from the producing party that privileged information or work-product material has been inadvertently produced, all such information, and all copies thereof, shall be returned to the producing party, and the Receiving Party and counsel shall not use such information for any purpose. Any analyses, memoranda or notes which were internally generated based upon such inadvertently-produced information shall immediately be destroyed.

20. Any violation of the terms of this Protective Order shall be punishable by money damages, interim or final injunctive or other equitable relief, sanctions, contempt of court

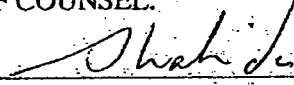
citation, or such other or additional relief as deemed appropriate by the Court. The foregoing remedies shall be in addition to any other common law or statutory relief available for violation of the terms of this Protective Order.

21. Discovery Material produced by third parties may be designated by them as Confidential Information pursuant to the terms of this Protective Order and, when so designated, shall be treated by the parties in conformance with this Protective Order.

22. The Court retains jurisdiction subsequent to settlement or entry of judgment to enforce the terms of this Protective Order.

AGREED:


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Sep. 9, 2004

OF COUNSEL:

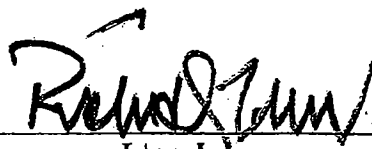

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Sept 8, 2004

The parties, having entered into the above stipulation, and having shown good
cause herein, it is SO ORDERED:


Léon, J.

9/12/04

EXHIBIT A

LIST OF QUALIFIED PERSONS, paragraphs 5(c) and 5(d)

[illegible]

EXHIBIT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SCIMED LIFE SYSTEMS, INC.,

Plaintiff,

v.

MEDTRONIC VASCULAR, INC.,

Defendant and Counterclaimant,

and ERIC C. MARTIN,

Defendant and Counterclaim-Defendant.

CASE NO. 1:01CV2015 (RJL)

I hereby certify (i) my understanding that Discovery Material and/or Confidential Information are being provided to me pursuant to the terms and restrictions of the Protective Order (the "Order") entered by the United States District Court for the District of Columbia (the "District Court") in this Action, and (ii) that I have read the Order. I understand the terms of the Order, I agree to be fully bound by the Order, and I hereby submit to the jurisdiction of the District Court for purposes of enforcement of the Order. I understand that violation of the Order may be punishable by contempt of court, or other sanction, penalty, injunction, or damages available at law or equity.

Dated: _____ Signature: _____

Name: _____

Address: _____

